

# Police nearly beat this WA man to death. Six years later, will the prosecution against him continue?

By David Gutman, *The Seattle Times*

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*Joseph Zamora is photographed outside his niece's former house in Moses Lake, Washington. In 2017, Moses Lake police, responding to a report of a possible vehicle prowler outside the house, confronted Zamora, leading to an altercation in which he was tased, pepper-sprayed, hog-tied and beaten so badly that when paramedics arrived he was not breathing and had no pulse. (Erika Schultz/The Seattle Times/TNS)*

In the coming weeks, a Grant County judge will decide whether the criminal case against Joseph Zamora will continue, 6 1/2 years after police nearly beat him to death, or whether charges should be dropped because the prosecution is vindictive.

In a blistering brief alleging prosecutorial inconsistencies, misconduct, mismanagement and vindictiveness, lawyers for Zamora — the Moses Lake man who spent a month in the ICU after being beaten by police before being prosecuted and convicted of assault, then having his case dismissed for prosecutorial racial misconduct, then being charged

with the same crimes all over again — are asking a Grant County judge to dismiss the case against him.

Zamora was walking to his niece's home on a snowy night in 2017, when after a neighbor mistakenly believed he was prowling through cars, Moses Lake police beat, pepper-sprayed, tased, kicked and hogtied him so severely that his heart stopped and he spent six weeks in the hospital.

He was charged and convicted of two counts of assaulting an officer and served 22 months in prison. He appealed his conviction to the state Supreme Court, arguing that Grant County's elected prosecutor at the time committed race-based misconduct at the trial.

But after the Supreme Court agreed to hear his appeal, with Zamora already out of prison, the new Grant County prosecutor, Kevin McCrae, asked to have the case dismissed, seeking to short-circuit the appeal. McCrae said his office was too short-staffed to argue the appeal and that "it is no longer in the interests of justice for the State to pursue this case."

The Supreme Court heard the case, and ruled that the former prosecutor, Garth Dano, had committed race-based misconduct. The justices threw out Zamora's convictions.

Zamora, who tested positive for amphetamine, methamphetamine and marijuana in the hospital, "was guilty of nothing more than walking while high on drugs," Justice Charles Johnson wrote for the unanimous Supreme Court.

In a concurring opinion, Chief Justice Steven González wrote that "the jury was asked to decide, among other things, whether Joseph Zamora, a United States citizen, assaulted a police officer's knuckles with the back of his head."

McCrae then made an abrupt about-face: He began charging Zamora with the same charges. Zamora has served more than a full prison term and couldn't serve any more time even if convicted.

"Mr. Zamora was almost beaten to death and served nearly two years in prison. The Prosecutor stood before this Court and requested — and obtained — a final dismissal because pursuing this case no longer served the ends of justice," Zamora's five Seattle-based lawyers wrote in the new filing. "The Prosecutor's attempt to retract that order is both disingenuous and precluded by well established legal principles. A retrial of Mr. Zamora is barred by constitutional due process protections prohibiting prosecutorial vindictiveness."

A hearing is scheduled for next month in Grant County Superior Court, where Judge Tyson Hill will determine whether the case against Zamora should be thrown out or move toward another trial.

McCrae, in a response brief, argues he is not being vindictive, that circumstances have changed since he asked to have the case dismissed, so his decision changed, too.

One, he says, the prosecutor's office has "more stability in staffing," although he says his office doesn't have more lawyers than it did when he asked to have the case dismissed. And two, he argues, there is a public interest in seeing the case through, in "having an airing of the facts of the case free from calls to bias from either side."

"Mr. Zamora still refuses to accept responsibility for his actions," McCrae writes. "It is well within the Prosecutor's discretion to continue with this case."

Zamora, 41, has a lengthy arrest record, both as an adult and as a juvenile, and McCrae attached to his response a list of police reports from the last decade. Most involved drugs; one led to an assault charge that was ultimately dismissed. Other older charges included obstruction of law enforcement, assault and possession of stolen property.

The motion to dismiss the case argues McCrae is recharging Zamora as an act of revenge, to get back at him for exercising his right to appeal his conviction.

"The State took a clear and unequivocal position that the case should be dismissed with prejudice," the motion says. "Yet when Mr. Zamora exercised his constitutional right to appeal and publicly held the State accountable for the Prosecutor's race-based misconduct during his first trial, the State reversed course and reinstated the charges against him. The State's actions serve only to punish Mr. Zamora for exercising his constitutional rights."

McCrae counters Zamora did not have a constitutional right to appeal, if the case had been dismissed. The dismissal, he writes, would have achieved the same result as having the Supreme Court toss the convictions.

"Thus the State cannot punish him for exercising a right he did not have," he wrote.

McCrae compares his decision to retry the case, after asking for dismissal, to a prosecutor's decision to offer a plea deal, but then proceed to trial if it is not accepted.

It is Zamora, he says, who is being inconsistent. Zamora opposed the dismissal two years ago, preferring to go forward with his appeal to the Supreme Court. Now, after the Supreme Court ruled, he wants the rekindled charges dismissed.

"It is not prosecutorial vindictiveness to continue a case after a deal has been rejected," McCrae writes. "Mr. Zamora chose to continue with this case. He does not get to pick and choose which of the parts of a case to participate in."

Zamora's five attorneys — Thomas Hillier II, a former federal public defender now with the firm Perkins Coie; David Perez, a partner with Perkins Coie; Cooper Offenbecher, a partner in the firm Allen, Hansen, Maybrown & Offenbecher; Robert Chang, a law professor and director of the Korematsu Center for Law and Equality at Seattle University; and Mark Middaugh, a criminal defense lawyer in private practice — began

representing Zamora pro bono, replacing his public defender, after a previous Seattle Times story on the case.

Their new filing repeatedly cites Seattle Times reporting.

It cites an email McCrae sent to the Moses Lake chief of police, the morning the Supreme Court ruled unanimously that Dano's conduct at trial — he asked potential jurors questions about illegal immigration, a border wall, and crimes committed by undocumented immigrants — constituted race-based misconduct.

McCrae had clearly been expecting the Supreme Court to rule against his office.

"We received Zamora back," he wrote in the email. "It is about as ugly as I would have expected. I would like to take a few minutes and discuss whether we should retry it."

In his concurring opinion, González had called McCrae's defense of Dano's actions "disingenuous."

"It is difficult to imagine stronger evidence of actual vindictiveness than a Prosecutor coming into the office, reading an opinion that concluded that his colleague committed race-based misconduct — and which accused him personally of 'disingenuous' conduct during oral argument — and immediately firing off an email seeking to resurrect charges he had previously sought to dismiss," Zamora's legal team wrote.

McCrae counters that getting rulings you disagree with, and saying you disagree with them, is part of a lawyer's job.

The state Supreme Court established a new legal standard in its Zamora opinion: A prosecutor has committed race-based misconduct if an objective observer, aware of the country's history of race discrimination, could view their actions as appealing to racial prejudice.

In his response this month, McCrae argues this standard is unconstitutional. The state Supreme Court, he argues, requires a prosecutor to "prove innocence of racial bias," reversing the burden of proof. He cites a statement from U.S. Supreme Court Justice Samuel Alito, in which Alito hints that the U.S. Supreme Court may revisit the standard set by the Zamora case.

"The procedures the state court has imposed appear likely to have the effect of cordoning off otherwise-lawful areas of inquiry and argument solely because of race," Alito, joined by Justice Clarence Thomas, wrote in June.

Zamora's lawyers also accuse the prosecution of violating the doctrine of judicial estoppel, which prevents lawyers from taking positions directly inconsistent from their prior claims.

McCrae's "180-degree shift" from seeking a dismissal to seeking a new trial, they write, is "an affront to judicial economic and fundamental notions of fair dealing."

McCrae says the most important thing that changed between then and now is staffing in his office.

In a declaration attached to his motion he writes that in November 2021, when he asked to have Zamora's case and appeal dismissed, his office had 12 attorneys, out of 16 allotted, and he was worried about several of them leaving.

Today, he says staffing is in "better shape," even though he still has only 12 attorneys, and that includes recent law school graduates who are awaiting the results of their Bar exam.

Zamora's lawyers, in a reply, cite comments from a former deputy prosecutor who worked on Zamora's case before leaving McCrae's office this summer.

"Our caseloads are out of control. We're just trying to tread water," Chad Jenks, the former prosecutor, said in a court hearing in May. "I've been up late at nights up to midnight, over the weekend trying to prep all of these things, and there's just too much. I'm doing my best."

McCrae's argument that he decided to retry the case because staffing improved "defies common sense," Zamora's lawyers write.

They argue the case has been tainted with government misconduct, from the moment Officer Kevin Hake "unlawfully detained" Zamora, through the beating, the racist questioning at trial, the prosecution's request to dismiss the case and now the resumption of charges.

"If the re-prosecution against Mr. Zamora is allowed to proceed, the message to other future defendants will be clear," Zamora's lawyers write. "If you challenge your conviction, expose injustice and wrongdoing by those in power, hold the government to its burden of providing a trial free from bias and prejudice, then Grant County can punish you."